

April 2, 2013

By Electronic Filing

Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: ***In the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation No. 337-TA-794***

On behalf of the Association for Competitive Technology (ACT), I write to respond to the Commission's request for additional information on the potential effect on the public interest if the Commission were to enter remedial orders barring entry and further distribution of Apple products alleged by Samsung to infringe U.S. Patent No. 7,706,348 in the above-referenced Investigation. As the leading trade association representing more than 5,000 small- and medium-sized software and mobile app companies, including more than 4,000 based in the United States, ACT is understandably concerned about the effect such remedial orders of the Commission could have on the mobile app industry.

Mobile apps are a huge and fast-growing industry. Just two years ago, our total industry revenues were \$3.8 billion. At the close of last year we had grown to \$20 billion and are projected to reach \$100 billion by 2015.¹ Consumers rely on apps to organize and improve their lives in many different ways. Today, billions of apps are downloaded, ranging from games to productivity and even healthcare. The app ecosystem affects millions of Americans and provides real, tangible benefit to their lives.

The industry provides jobs for hundreds of thousands of Americans. University of Maryland research identified 182,744 jobs created by the Facebook platform alone, while separate research by ACT and TechNet concluded that the app economy has created between 460,000 and 600,000 jobs. A study completed by ACT in 2012 revealed that 78 percent of the top app

¹ Egle Mikalajunaite, "The Application Development Market Will Grow to \$US100bn in 2015," research2guidance (July 6, 2011) available at <http://www.research2guidance.com/the-application-development-market-will-grow-to-us100bn-in-2015/>.

developers in U.S. app stores are small businesses of 500 employees or less and developers are located all over the country.²

ACT appreciates that the Commission requested that submitters avoid discussions of issues relating to standards-setting while addressing how an exclusion order would affect the public interest. However, ACT submits that it is not possible to give full and fair consideration to the impact of an exclusion order on the public interest without weighing the standard-setting issues raised by this Investigation.

Standards create dynamic, interoperable technological ecosystems, which allow predictable platforms for the app economy. Standards allow developers to build their products and adopt new platforms without the uncertainty of interoperability and at a lower cost. ACT's members use standards to bridge barriers to entry, knowing that they can concentrate their resources on a specific product and rely on standards to provide the key underpinnings. If small companies can no longer depend on standards to create that bridge, time and money will be spent simply re-inventing the wheel to manage various functions now handled by standards. It would hinder innovation and product development, which provides significant value to app developers and the public at-large.

ACT is supportive of enforceable intellectual property rights, as they are essential for app developers. However, where a business has made an irrevocable commitment to license its patent under FRAND terms, it should not be allowed to destabilize the standards setting system by seeking an exclusionary remedy. Samsung pledged to license its U.S. Patent No. 7,706,348 on FRAND terms. If this Commission allows an exclusionary remedy, it would enable Samsung to breach its FRAND obligations, undermining the standards setting process and negatively affecting the public interest.

If the Commission imposes an exclusionary remedy and permits Samsung to avoid its FRAND obligation, it would disrupt the entry and further distribution of products which run developers' apps and substantially affect the businesses of tens of thousands of app developers all over the United States. As the majority of app developers are small businesses without the financial resources to pay legal and marketing departments, they rely on the stability of the mobile industry to create a predictable environment in which to build their businesses. The impact of any exclusionary order will far exceed simply the number of mobile devices sold. A reduction of mobile devices ordered by the Commission will create instability within the app industry which hurts both developers and consumers.

Among the public interest factors that the Commission must consider are "competitive conditions in the United States economy, the production of like or directly competitive articles

² "Apps Across America: The Economics and Ecosystem of the Mobile App Market," ACT (July 18, 2012), available at <http://actonline.org/files/Apps-Across-America.pdf>.

in the United States, and United States consumers.” 19 U.S.C. § 1337(d)(1). For the reasons detailed above, issuing exclusion orders for FRAND-committed patents would severely harm the public interest in a tangible way, as it would negatively disrupt app developers’ businesses and prevent the public from benefiting from the diverse and growing app economy. We submit that the public interest should preclude any issuance of an exclusion order.

Respectfully Submitted,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive, flowing style.

Morgan Reed
Executive Director